

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 01-0272
	:	
M. ROBERT ULLMAN,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

May 8, 2002

Presently before the Court is the United States' Motion for Summary Judgment on Defendant's counterclaim pursuant to 26 U.S.C. § 7433 alleging that the Internal Revenue Service (the "IRS") intentionally, recklessly or negligently violated the Internal Revenue Code in collecting taxes allegedly owed by him. Defendant, a pro se litigant, also moves for summary judgment on this same counterclaim. For the reasons stated below, the United States' Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

I. FACTS AND PROCEDURAL HISTORY

The United States initiated this proceeding on January 18, 2001 by filing a one-count complaint to reduce a tax assessment to judgment against M. Robert Ullman ("Ullman" or "Defendant"), for his unpaid tax liability. Defendant's tax

liability stems from a February 4, 1991 trust fund recovery penalty assessment resulting from a determination that he was the responsible person for the employee withholding taxes of Canoe Manufacturing Co. Inc. for the first and second quarters of 1989.¹

The IRS subsequently agreed to allow Ullman to pay his tax liability in installments. He first attempted to negotiate a \$400.00 per month payment, which the IRS rejected, contending that Ullman had the ability to make payments of \$1,000.00 per month. Eventually, Ullman and the IRS entered into an installment agreement on January 25, 1995, which required Ullman to make monthly payments of \$600.00. According to Ullman, during the negotiation process, he made known to the Revenue Officer handling his case, Eugene Clarke ("Clarke") that a reduction in his pension payments was imminent. Clarke inquired, "When could the reduction occur?" Ullman answered, "Within two years." Clarke responded, "If that occurs, we will reduce your monthly payments by a like amount."

In addition to Ullman's complaints that he could not afford \$600.00 monthly payments, throughout the installment negotiation process, he consistently maintained that he was not

1. Defendant believes it is more accurate to describe his tax liability as two assessments: (a) October 23, 1989 in the amount of \$925,010.88; and (b) February 4, 1991 in the amount of \$80,430.47.

For purposes of Defendants counterclaim pursuant to 26 U.S.C. § 7433, it is irrelevant in what manner the penalty was assessed.

responsible for the tax debt. Ullman claimed that Meridian Bank maintained third party responsibility for the tax debt, because Meridian Bank controlled funds providing payment for wages of Canoe Manufacturing employees pursuant to an agreement between Meridian Bank and Ullman. Ullman also claimed that the IRS had miscalculated his ability to pay monthly installment amounts by including his wife's income in the financial statement analysis and by failing to take into account his pension reduction.

Despite Ullman's dissatisfaction with the IRS' handling of his case, he consistently and fully made monthly payments to the IRS as provided for under the January 25, 1995 installment agreement. However, after approximately five years of timely payments, Ullman reduced his monthly \$600.00 installment payment to the IRS when the Pension Benefit Guarantee Corporation finally reduced his pension in March, 2000. The IRS construed Ullman's conduct as a unilateral reduction in monthly installment payments without authorization from the IRS. Consequently, the IRS terminated the installment agreement. See 26 U.S.C. § 6159(b)(4)(A) (authorizing termination of an installment agreement when a taxpayer fails to pay any installment at the time such installment payment is due). Ullman maintains that Revenue Officer Clarke authorized such reduction at the time that the installment agreement was executed.

Defendant filed an answer to the United States' complaint and a counterclaim against the IRS on February 8, 2001. In addition to his other counterclaims, Defendant alleged that the IRS violated a signed installment agreement.

On October 30, 2001, the Court entered an Order granting the United States' first Motion for Summary Judgment, entering a judgment in favor of the United States and against Defendant for trust fund recovery penalty taxes for the first and second quarters of 1989 in the amount of \$112,010.95 plus statutory additions accruing according to law from May 1, 2001, and dismissing Defendant's counterclaims against the United States. The Court dismissed Defendant's counterclaim for unauthorized collection activities pursuant to 26 U.S.C. § 7433 (the subject of the instant motion) as time barred by the two year statute of limitations. See 26 U.S.C. § 7433(d)(3) (setting two year limitations period).

Subsequently, Defendant filed a Motion to Reconsider the Court's Order dated October 30, 2001, which the United States opposed. On January 29, 2002, the Court signed an Order vacating the Order dated October 30, 2001 with respect to Defendant's counterclaim alleging unauthorized collection activities in violation of 26 U.S.C. § 7433 and reinstating Defendant's counterclaim. In its decision, the Court relied on Defendant's allegations that the installment agreement he entered into with

the IRS may have permitted him to reduce his monthly installment payments to the IRS. As noted above, Ullman alleges that during negotiation of the January 25, 1995 installment agreement he notified Revenue Officer Clarke that he expected a reduction in his monthly pension benefits within the next two years and that Clarke told him that if his pension benefits were reduced, he could reduce his monthly installment payment by a like amount. Ullman contends that he relied on this alleged oral agreement when he reduced his monthly installment payment. Based upon these allegations, the Court, in its January 29, 2002 decision, reasoned that:

If the oral terms, to which Defendant refers, became part of the installment agreement and entitled Defendant to reduce his monthly installment payments to the IRS once his pension payments were similarly reduced, it does not appear that the IRS had any authority to terminate Defendant's installment agreement. The Court assumes that without such authority, the IRS' act of unjustifiably terminating a valid installment agreement would be in disregard of a statute of the Internal Revenue Code or a regulation promulgated thereunder in connection with the collection of Federal tax in violation of 26 U.S.C. § 7433.

The parties now bring cross-claims for summary judgment with respect to Defendant's counterclaim alleging unauthorized collection activities in violation of 26 U.S.C. § 7433.

II. STANDARD

A motion for summary judgment shall be granted if the Court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources . . . must be viewed in the light most favorable to the party opposing the motion." Id.

III. DISCUSSION

Under 26 U.S.C. § 7433(a), a cause of action lies where an IRS employee recklessly or intentionally disregards any provision of the Internal Revenue Code in connection with its tax collecting activities. Under § 7433(b), the taxpayer can recover his "actual, direct economic damages sustained" as a "proximate result" of an IRS employee's improper actions under § 7433(a).

In support of his counterclaim, Ullman asserts a myriad of complaints, many of which were addressed in this Court's Memorandum and Order dated October 30, 2001, granting summary judgment to the United States. The Court will limit its examination to those issues which pertain to Ullman's

counterclaim pursuant to 26 U.S.C. § 7433 as framed in the Court's Order granting Defendant's Motion for Reconsideration dated January 29, 2002.

Ullman's primary argument is that the January 25, 1995 installment agreement, entered into between himself and the IRS, was a contract providing for certain terms and conditions, which were not honored by the IRS. Specifically, Ullman alleges that the IRS did not honor (1) the oral agreement entered into contemporaneously with the written agreement, allowing him to reduce his monthly payments to the IRS as soon as his pension benefits was similarly reduced; (2) the standard condition written on the face of the document stating:

This agreement is based on your current financial circumstances: It is subject to revision or termination if subsequent financial information required by IRS reflects a change in your ability to pay;

and (3) the statement appearing in the comments section on the face of the installment agreement, "Agreement will be reevaluated on or about 1-26-97."

Ullman states that the (1) IRS terminated the installment agreement when he reduced the monthly installments after his pension was reduced; (2) the IRS never revised the installment agreement despite information reflecting a change in his ability to pay and despite repeated requests; and (3) the installment agreement was never reevaluated on 1-26-97 or at any

time. Ullman argues that these infractions, culminating in the IRS' termination of the installment agreement, were breaches of a binding contract and constitute unauthorized collection activities in violation of 26 U.S.C. § 7433.² In support of his breach of contract theory, Ullman points to a letter written by Mr. Louis Romito ("Romito") of the Taxpayer Advocate in which Romito stated "I agree with you that [the installment agreement] is sufficiently contract like that both parties to the agreement are bound by its terms as though it was a contract."

It is axiomatic that before a contract may be found, all of the essential elements of a contract must exist, including consideration. 8 P.L.E. Contracts § 9 (1971). The requirement of consideration, of course, is nothing more than a requirement that there be a bargained for exchange. Estate of Beck, 414 A.2d 65, 68 (Pa. 1980). There can obviously be no such bargained for exchange if one of the parties is already legally bound to render the performance promised. Chatham Communications, Inc. v. General Press Corp., 344 A.2d 837, 840 (Pa. 1975); Cohen v. Sabin, 307 A.2d 845, 849 (Pa. 1973).

Ullman argues that his agreement to pay \$600.00 per month, or 27% of his monthly income, was more than sufficient

2. Although Ullman has not pointed to a specific Internal Revenue Code provision that the IRS intentionally, recklessly or negligently violated as required under 26 U.S.C. § 7433, the Court assumes that his allegations, if true, would constitute the unlawful termination of the installment agreement in violation of 26 U.S.C. § 6159.

consideration to form a contract. While the Court recognizes the significant burden \$600.00 monthly payments placed on Ullman, his agreement to make the monthly payments as provided for under the installment agreement cannot constitute the required consideration because those monthly payments were credited against a tax liability for which Ullman was already obligated. Prior to the execution of the January 25, 1995 installment agreement, Ullman's tax liability was established through a trust fund recovery penalty assessment resulting from a determination that he was the responsible person for the employee withholding taxes of Canoe Manufacturing Co. Inc. for the first and second quarters of 1989. It was only because of the pre-existing tax liability and the IRS' assumption that a monthly payment arrangement would facilitate the collection process, that the IRS agreed to accommodate Ullman and allow for payment of the assessment on an installment basis.

Thus, although an agreement in the general sense, the installment agreement is not a contract in the sense that breach of its terms gives rise to a common law breach of contract action because of the absence of consideration on the part of Ullman. The IRS would no more have a claim against Ullman for breach of contract had he missed a monthly payment to the IRS as Ullman now assumes he has against the United States for allegedly failing to honor certain terms of the installment agreement. Pursuant to

the installment agreement, the IRS allowed Ullman to satisfy his pre-existing tax liability over time. For purposes of 26 U.S.C. § 7433 it is irrelevant whether Revenue Officer Clarke orally promised Ullman that he could reduce his payments once his pension benefits were reduced because breach of this alleged oral contract does not constitute a violation of the Internal Revenue Code and therefore, is not cognizable as an unauthorized collection activity for which a cause of action would lie under 26 U.S.C. § 7433.

In contrast to the legal concept of a binding contract, which requires consideration, an installment agreement operates pursuant to statute. See 26 U.S.C. § 6159. The IRS is authorized to enter into a written agreement allowing payment of taxes on an installment basis if it is determined that the agreement will facilitate collection. 26 U.S.C. § 6159(a); 26 C.F.R. § 301.6159-1(a). Thus, oral agreements are not contemplated by the statute. Accordingly, oral agreements would not be incorporated into the terms of a written installment agreement.

An installment agreement may be terminated or modified for a variety of reasons including when the taxpayer fails to pay any installment at the time the payment is due under the agreement. 26 U.S.C. § 6159(b)(4). Once an installment agreement has been executed, the IRS may only terminate the

agreement if a condition enumerated in the statute is present. Termination for any reason other than those enumerated in the statute would be in violation of 26 U.S.C. § 6159 and could perhaps give rise to a cause of action for unauthorized collection activities under 26 U.S.C. § 7433. In this case, however, the January 25, 1995 installment agreement required Ullman to make a \$600.00 payment to the IRS each month. Starting in May of 2000, Ullman failed to do so and made payments of only \$224.40 per month. Because Ullman failed "to pay an installment at the time such installment payment [was] due," the IRS was authorized, pursuant to 26 U.S.C. 6159(b)(4)(A), to terminate the installment agreement and take other lawful action to ensure that it would received payment on Ullman's tax liability.

In sum, there is no legal contract for which breach of its terms would give rise to a cause of action because the lack of consideration on the part of Ullman prevents the installment agreement from being treated as such. Furthermore, breach of a contract does not constitute a violation of the Internal Revenue Code, a requirement under the statute which Ullman brings his counterclaim. Lastly, the IRS acted properly and pursuant to statute in terminating the installment agreement when Ullman failed to make the full \$600.00 payment as provided under its terms.

As for Ullman's complaint that the IRS refused to reevaluate his monthly payments on 1-26-97, as provided on the face of the installment agreement, Ullman argues that this backs up, in writing, Revenue Officer Clarke's oral promise that his installments would be reduced once his pension benefits were reduced because that was the approximate date that Ullman anticipated a reduction in his pension. A taxpayer may request that the IRS alter, modify or terminate the terms of the installment agreement because of a change in the taxpayer's financial circumstances. 26 U.S.C. § 6159(b)(3). However, Ullman's change in financial conditions, i.e., the reduction in pension benefits, did not occur until March 2000. Thus, any obligation on the part of the IRS to reevaluate Ullman's installment payments on 1-26-97 was not yet triggered because the changed financial conditions of reduced pension benefits had not yet occurred. With respect to the installment agreement's boiler plate language that it is "subject to revision or termination if subsequent financial information required by IRS reflects a change in your ability to pay," IRS calculations repeatedly show that any revision would require Ullman to pay more than the \$600.00 which was required under the January 25, 1995 installment agreement, even after March 2000 when his pension was finally reduced.

Ullman also argues that the installment agreement he executed was not the statutory instrument described in 26 U.S.C. § 6159, but rather an offer in compromise. An offer in compromise is a contractual agreement between the IRS and a taxpayer under which the taxpayer agrees to pay a specified amount in full settlement of assessed tax liabilities. See 26 U.S.C. § 7122(a). In support of this contention, Ullman notes that it would take approximately 225 years to pay off his total tax liability of \$1,627,884.69 by making \$600.00 monthly payments. Therefore, given this anomalous period of time, Ullman argues that the IRS never intended to collect the full amount of his tax liability but rather was willing to accept a part of the liability in full settlement of the assessed liability.

Ullman's arithmetic, which could just as easily exhibit the generous accommodation the IRS made for Ullman, does not establish that the January 25, 1995 installment agreement was actually an offer in compromise. In fact, the record establishes that the agreement should not be construed as anything other than an installment agreement.

First, the document was written on an IRS Form 433-D, entitled "Installment Agreement." Second, the agreement provides that "\$600.00 will be paid no later than the 25th of each month thereafter until the total liability is paid in full." (emphasis added). Further, there is evidence that Ullman twice attempted

to enter into an offer in compromise and settle with the IRS for a lesser amount than that of his total tax liability, but the IRS did not accept his offers because of the insufficiency of the amount Ullman offered.

Therefore, because of the lack of supporting evidence suggesting that the January 25, 1995 agreement was actually an offer in compromise and the evidence which establishes that the document was indeed an installment agreement, the Court holds that the document executed by Ullman on January 25, 1992 was an installment agreement.

To the extent that Ullman argues that the IRS' refusal to accept Ullman's offers in compromise is an unauthorized collection activity, Ullman's argument fails. Compromising tax liabilities is a purely discretionary activity and will not give rise to a claim for intentional, reckless or negligent violation of the Internal Revenue Code. See Addington v. United States, 75 F. Supp. 2d 520, 524 (S.D. W. Va. 1999).

IV. CONCLUSION

For the reasons stated above, the United States' Motion for Summary Judgment on Defendant's counterclaim pursuant to 26 U.S.C. § 7433 alleging that the IRS engaged in unauthorized collection activities is granted and Defendant's counterclaim is dismissed.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 01-0272
	:	
M. ROBERT ULLMAN,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 8th day of May, 2002 upon consideration of the United States' Second Motion for Summary Judgment (Docket No. 32) and Defendant's response in opposition thereto (Docket No. 33) and Defendant's Second Motion for Summary Judgment (Docket No. 36) and the United States' response in opposition thereto (Docket No. 37) along with other matters of record, it is hereby **ORDERED** that the United States' Second Motion for Summary Judgment is **GRANTED** and Defendant's counterclaim is dismissed. It is further **ORDERED** that Defendant's Second Motion for Summary Judgment is **DENIED**.

This case is marked **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.